

TITLE	Review of Procurement – Impact of New Procurement Regulations
FOR REVIEW BY	Community and Corporate Overview and Scrutiny Committee – 21/11/16
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SUMMARY OF REPORT

The Government's new Public Contracts Regulations 2015 came into force from 26 February 2015, in response to substantial revisions in the EU Directive (see background below for key changes and impact).

Corporate Procurement and Shared Legal Services devoted significant resources and effort in reviewing and interpreting the detail of the new legislation to determine how it would be implemented in WBC's own Procurement and Contracts Regulations.

The need to change the WBC Procurement and Contracts Regulations for the new legislation was also a good opportunity to completely reconstitute the then WBC Regulations from an unwieldy, complex and non-user facing document to a much clearer and more effective set of Rules and Procedures that better facilitate user understanding and effective adoption.

The resultant new Procurement & Contracts Rules and Procedures (PCRP) – now Chapter 13 of the Constitution - was approved by the Constitutional Review Working Group and subsequently by full Council in November 2015. As well as a constitutional document, it also acts as a comprehensive and practical set of operating instructions to officers, in line with the requirements of the new legislation. The changes aim to spread best practice and improve compliance across the Council.

OUTCOME / BENEFITS TO THE COMMUNITY

Strategic Benefits

The new Procurement & Contracts Rules & Procedures allow the Council to:

- Increase market testing for supplier spend as part of good management practice
- Improve value for money in our procurement and contracts / generate savings
- Reduce risk of non-compliance to procurement legislation, which could result in legal challenges from tenderers and suppliers and/or significant fines from legislative authorities.
- Increase transparency

Operational Benefits

Through a dedicated training programme launched in the spring of 2016, and with the ongoing drive by the corporate Procurement team, the PCRP will:

- Give officers a better understanding of risks and improve commercial awareness
- Raise staff skill levels, widen adoption and extend good practice in a decentralised procurement structure
- Direct staff to seek earlier advice and help for higher risk contracts or situations
- Provide the Council with greater central visibility of key procurement and contract activity to allow proactive interventions and more effective management
- Improve accountability through clearer processes and approval levels

BACKGROUND

1. Legislation Change

The long-awaited Public Contracts Regulations 2015 legislation is the UK Government's response to substantial revisions in the EU Directive. It not only enacts the requirements of the EU Directive into UK law but also gives effects to the Government's own policy on economic growth and development through public procurement activity. The key changes to legislation include:

- Part B exempt services brought within the Regulations (light touch regime)
- Increased support for involvement of SMEs
- Below-threshold obligations, particularly in regard of advertising
- Changes to selection & award criteria
- Shortened timescales
- Changes to procedure

With the UK Referendum vote on 23 June 2016 in favour of 'Brexit', it has been speculated in some quarters that the Public Contracts Regulations 2015 could be radically amended once the UK leaves the EU. In practice, it is unlikely that the legislation will be changed for a number of years, not least because it will be low on the Government's priorities post-Brexit, so it should be assumed that all public bodies will have to continue to work within this framework for the foreseeable future.

2. The current WBC Procurement and Contracts Regulations

Prior to the approval of the new WBC Procurement & Contracts Rules and Procedures (PCRPs), the previous Procurement and Contracts Regulations were contained in Chapter 12.2 of the Constitution as a 122 page tome that had been added to and grown over time. It was designed to be detailed, prescriptive and legalistic in approach and was structured in an encyclopaedic style, written by procurement professionals for procurement professionals.

However, in trying to be so detailed and prescriptive, it lost its effectiveness as a source of guidance for non-expert users as the structure was difficult to navigate, the guiding principles were obscured and rules were not easily distinguishable from processes. In a decentralised procurement organisation, the inherent complexity and non-user focused nature of the document increased the risk of non-compliance as staff did not easily understand it and may not have referred to it.

THE NEW WBC PROCUREMENT & CONTRACT RULES & PROCEDURES

The new PCRPs has therefore been completely redrafted to incorporate the latest legislation and best practice but to make it into a more effective working document for officers to follow in their routine procurement activity. Not only is it intended to form part of the Council's constitution; it is a practical operating manual to instruct officers of the Council's requirements around procurement and contracts, as well as the procedure to follow in any scenario.

The title of the document itself has been changed to clearly state that it contains rules and procedures for WBC and to distinguish it from the Public Contract Regulations 2015, which is the legislation that underpins it. It has also been split from the Finance Regulations, as a distinct chapter (13) in the Constitution, to enhance the chance of it being read and used. Other Authorities, like RBWM, have this separation.

The PCRCP has been slimmed down to a 11-page core Rules & Procedures document, which forms the Constitutional document. This is driven by clear principles and an overarching framework but various links to a glossary, appendices, process flow charts, guidance notes and other sources of information outside of the document turns it into a practical operating manual for users. These provide operational information in the practical application of the rules and procedures. The PCRCP and all the links are held on the Council's Grapevine intranet pages as the means of offering easy user access.

The core document contains 4 key sections:

1. **Purpose and Significance** – this specifies what the PCRCP is and why it is important to the Council.
2. **General Principles** – clearly sets out what the rules and procedures applies to, who it applies to in terms of responsibility and compliance and addresses measures to avoid conflicts of interest.
3. **The Procurement and Contract Rules** – a comprehensive but concise summary of the rules, set out in chronological order for ease of use, and details the:
 - i. pre-procurement approvals needed before procurement commences
 - ii. required procurement procedure to use in any scenario
 - iii. contracting requirements to engage with suppliers, and
 - iv. contract management requirements during the life of the contract
4. **Overview of Procurement Process Selection** – provides a systematic route-finder for users to identify which procurement process to follow dependent on the nature and size of their procurement, with links within the document to practical guidance notes, flowcharts and useful information to aid users apply the process.

Whilst the PCRCP aims to provide clarity on the rules and procedures for any procurement, there will be situations where users need more specific guidance. One consistent theme of the PCRCP is therefore the call for users to engage with the Procurement and Legal teams where in doubt and in specified situations for advice.

IMPLEMENTATION AND ROLL-OUT OF NEW PCRCP

Following approval by Council, a training programme was designed and developed to support the implementation and roll-out of the new PCRCP. This was launched in the spring of 2016 and consisted of:

- A number of eLearning modules on different aspects of procurement and contract management. The first of these is live and is an introductory course for all staff, covering the basics of procurement within the Council, and is intended to become mandatory training for all new starters.
- Classroom training courses tailored for different parts of the organisation – social care commissioning teams and a separate course for the rest of the Council. So far, 4 courses have been run for 37 people with good feedback from attendees. An active “wait list” is held to ensure an ongoing pipeline of training is delivered.

- Ongoing Procurement Business Partner support to Service areas for specific procurement activity to help staff learn on the job and to spread learning and best practice across the Council.

IMPACT OF THE NEW PROCUREMENT & CONTRACT RULES & PROCEDURES

- *Part B exempt services replaced by 'light touch regime' for certain services*

Exemptions from Procurement Regulations for what were classified as Part B services (such as the commissioning of health and social care contracts) are no longer available and are replaced by the new 'light touch' regime. For social care procurements with contract value above £589,000 this means that a formal but 'light touch' tender process is required for all opportunities, which does give some flexibility as to the process to be used in each case so long as it can be demonstrated to be open, fair and transparent. Even for contracts under the OJEU threshold, the PCRPs still requires best practice to be followed but without the rigid advertising and timescale requirements of the light touch regime.

The impact for WBC is that the level of tendering activity and market testing for social care contracts has increased within the Strategic Commissioning areas for Adult Social Care and Children's Services with significant support from Corporate Procurement. Whilst this has placed real resource pressure on the teams, it has exposed more spend in these areas to competition. A desired outcome is that for every procurement that has taken place, procurement savings have been achieved.

- *Increased support for involvement of SMEs*

Amongst a raft of measures to give SMEs greater access to public tender opportunities, Contracting Authorities are 'encouraged' to break contracts into lots, the advertisement of any contract opportunity is now specified and the process options defined. It is now a statutory requirement to publish opportunities valued at over £25k on *Contracts Finder* as well as traditional channels. Likewise, there is a ban on using a separate PQQ stage to limit the number of tenderers, based on certain criteria, to narrow the field for processes below specific thresholds. This effectively makes the Open Procedure the default for sub OJEU procurements.

The advertising impact is not significant, but the prohibition on using a PQQ process for below threshold tenders means that every tender received must be evaluated and processed in full. This can be time-consuming and inefficient where high numbers of tenders are received for particular opportunities.

- *Documentation*

The new regulations require that all documents used in the procurement process are available at the same time as the OJEU notice is issued and, depending on the process, cannot be materially amended. The impact is that officers now have to be much more organised and better prepared in their procurement planning to have fully considered, scoped out and fully specified tender documents in advance.

- *Selection and award*

Public bodies can now exclude bidders during the procurement process on a wider set of grounds, including poor historic performance. These new rights provide flexibility to

exclude a supplier from tender opportunities for a number of reasons, which were not possible previously, and reduce the risk of having to award contracts to suppliers who perform well at evaluation but where evidence of delivery is to the contrary. It also includes clarification of the treatment of abnormally low tenders, which we now have a duty to investigate, and allows us to exclude the supplier if appropriate.

RISKS OF NON-COMPLIANCE

- Increasingly litigious environment leading to greater legal challenges from tenderers/suppliers over application of process (rather than decisions) – unlimited damages.
- Maximum fine for non-compliance to Public Contract Regulations – 10% gross annual turnover.
- Other possible sanctions during the procurement/contract lifecycle:
 - Immediate suspension of contract making
 - Overturning of contract award decisions
 - Enforced shortening or termination of contracts

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